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# ST. JOHN'S LAW REVIEW

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## ARTICLES

### ROBIN HOOD JURISPRUDENCE: THE TRIUMPH OF EQUITY IN AMERICAN TORT LAW\*

JOHN J. FARLEY, III\*\*

#### INTRODUCTION

I am here as a former, perhaps you might say reformed, tort lawyer. My labors in the vineyard of tort law began in 1973, and, from 1980 until 1989, I was a Director of the Torts Branch, Civil Division, of the United States Department of Justice. Shortly after joining the United States Court of Veterans Appeals, my Chief Judge, Frank Q. Nebeker, and retired New Hampshire Chief Judge Bill Grimes, asked me to survey the massive changes that have occurred in tort law and to identify the major trends that might be useful in divining where the law might go in the 1990's and beyond. I was specifically directed to call upon you to repent if you have been among those who have strayed from classic tort doctrine

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\* These remarks were prepared for delivery to the American Bar Association Appellate Judges Seminars in Orlando, Florida, on February 28, 1990, and Honolulu, Hawaii, on January 23, 1991.

\*\* Associate Judge, United States Court of Veterans Appeals. I would like to express my appreciation and gratitude to Elisabeth Monaco for her invaluable research and suggestions and to William H. Bristow, III, for his comments on the numerous drafts.

and to secure a commitment in blood that you will go henceforth and sin no more.

I suspect that many of you, like me, have taken a micro view of tort law because your focus at any given point in time was upon the particular case, parties, and issues before you. For this presentation, I was able to take a more macro approach, to look at the development of tort law from a perspective far broader than that required to litigate—or to decide—a specific case. I was surprised to come to the realization that the classic rules of tort analysis dealing with concepts of duty, foreseeability, and causation receive only lip service today.<sup>1</sup> Rather than a limitation upon liability, modern causation has become a license for courts to reach a desired result by employing “mixed considerations of logic, common sense, justice, policy and precedent.”<sup>2</sup> We have come full circle; today there is but one rule, and it is a rule derived from the law of equity as it was applied by the King of England and his Lord Chancellor in the Middle Ages: an injured plaintiff is entitled to compensation from some or all who have the resources to pay.

#### I. ANGLO SAXON JURISPRUDENCE: THE RISE OF THE LAW OF EQUITY

The law of torts can be traced back to a simple root: vengeance, the blood feuds of primitive societies. Clan or tribal warfare eventually gave way to individual action, and, in the early years, when there was still no distinction made between tort and crime, the old appeals<sup>3</sup> of murder, mayhem, and larceny led to trial by battle or combat. Later it became possible for an accused aggressor to buy his way out of a blood feud or trial by battle by paying money or something of value to the victim or his clan. Increasingly, a sum of money also had to be paid to the king or feudal lord, a practice which soon became so onerous that it was all but impossible for the tortfeasor to “buy back the peace once it

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<sup>1</sup> Professor Aaron D. Twerski, my torts professor and mentor, describes himself in the preface to a 1987 products liability text as “an Orthodox Hassidic Rabbi from Brooklyn (who happens to also be a products liability nut).” J. HENDERSON, JR. & A.D. TWERSKI, *PRODUCTS LIABILITY: PROBLEMS AND PROCESS* at xxvi (1987). He pounded into me the need for strict duty analysis in each and every tort case.

<sup>2</sup> See C. REMBAR, *THE LAW OF THE LAND* 11 (1980).

<sup>3</sup> “The word ‘appeal’ has had two meanings in the law. There is the one today familiar: review by a higher court of the judgment of a lower. The other is strange now even to attorneys: it was the name of a criminal proceeding brought not by government but by a private citizen.” *Id.* at 19-20.

had been broken."<sup>4</sup>

Some time soon after the Battle of Hastings and the Norman Conquest of 1066, a tortfeasor was permitted to surrender himself and his goods to the king and beg for clemency (perhaps this was the forerunner of modern bankruptcy practice!). The wrongdoer was then at the mercy of the king and, upon payment of an amercement or fine, he received the king's protection. "The list of conduct meriting amercement was voluminous: trespass, improper or false pleading, default, failure to appear, economic wrongs, torts, and crime . . ."<sup>5</sup> The king's fines became so arbitrary and abusive that the practice was among the grievances specifically addressed by the Magna Carta in 1215. After the Magna Carta, the amount of an amercement was initially set by the court and could be reduced by the defendant's peers.<sup>6</sup>

The principal basis of wealth in the Middle Ages was land, and, under the Normans, all land belonged to the king; those fortunate enough to hold land did so as tenants at the pleasure of the king. Various classes of subtenants owed their livelihood and existence to these feudal lords, who ruled their realms as both judge and jury. The Normans had established an efficient system of central control through this strict feudal structure and, in the thir-

<sup>4</sup> Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139, 154 (1986).

<sup>5</sup> *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 288 (1989) (citations omitted).

<sup>6</sup> The ancient topic of amercements was recently debated in the Supreme Court of the United States. Justice O'Connor suggested that the excessive fines clause of the eighth amendment might serve to limit punitive damages in tort cases. Pointing out that the clause has its roots in the Magna Carta prohibition of disproportionate amercements, she quoted *Romeo and Juliet* to suggest that fines and punitive damages were indistinguishable from amercements:

"I have an interest in your hate's proceeding,  
My blood for your rude brawls doth lie a-bleeding;  
But I'll amerce you with so strong a fine,  
That you shall all repent the loss of mine."

*Browning-Ferris*, 492 U.S. at 290 (quoting W. SHAKESPEARE, *ROMEO AND JULIET*, at III.i. 186-189).

The majority "confidently" dismissed the argument in a footnote, claiming that "damages and amercements were not the same." *Id.* at 270 n.13. Responding to Justice O'Connor's "reliance on the Bard," the majority observed:

"Though Shakespeare, of course,  
Knew the Law of his time,  
He was foremost a poet,  
In search of a rhyme."

*Id.* at 265 n.7.

teenth century, their royal courts began to lay the foundations for the common law by taking the place of the local or feudal courts, instituting jury trials and prosecution of crimes by the crown.

To gain access to the royal courts, a prospective plaintiff had to secure a writ, which was an order signed by the Lord Chancellor in the name of the king directing that the defendant appear in court and show cause why plaintiff should not prevail. The conditions for a writ were strict, and, without a writ, no remedy existed. The original thirteenth century civil writ of trespass, which dealt with actions of violence or forcible injury, was supplemented in the fourteenth century by the writ of trespass on the case, which applied to injuries that had not resulted from force. If a plaintiff could not fit his claim into one of these two writs, no actionable tort claim would be recognized. It was not until the Common Law Procedure Act of 1852 eliminated the strict writ requirements that courts were permitted to entertain tort actions resulting from a wider variety of circumstances.<sup>7</sup>

The adverse decisions that resulted from the strict application of the common law by the royal courts led to an increasing number of appeals to the king, "the fountain of justice," who was bound by no rule or writ. As the number of appeals grew, the job of deciding them eventually was delegated to the Lord Chancellor; Vice-Chancellors were soon appointed; and finally a Court of Chancery developed. The law of equity had arrived.

Originally regarded as a supplement to the common law, the law of equity was governed not by technicalities, but by fairness and flexibility. Equity dealt either with matters not covered by the common law or with inequitable results compelled by the common law. The letter and the spirit of the law of equity can be seen in some of the maxims that developed over the years:

- Equity will not suffer a wrong to be without a remedy.
- He who seeks equity must do equity.
- He who comes into equity must come with clean hands.
- Delay defeats equity or equity aids only the vigilant.
- Equality is equity.
- Equity looks to the intent rather than the form.
- Equity looks on that as done which ought to be done.

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<sup>7</sup> This change paved the way for the landmark decision of *Rylands v. Fletcher*, L.R. 3 H.L. 330 (1868), the predicate for the modern doctrine of strict liability.

- Where the equities are equal, the first in time shall prevail.<sup>8</sup>

The less restrictive equity courts became increasingly popular over time, resulting in centuries of competition with the common law courts. Chancery and common law judges often issued contradictory verdicts in the same matter. The disputes became so severe that in the seventeenth century, King James I ordered the Lord Chancellor and the Lord Chief Justice, the head of the common law courts, to submit their differences to the Attorney-General, Sir Francis Bacon. Following Bacon's recommendation, James I declared that equity would prevail when there was an irresolvable conflict between equity and the common law. Despite this ruling, the common law courts never completely acquiesced until 1873, when the Judicature Acts eliminated all of the then-existing courts, created a unified court structure, and directed that equity and common law be applied in tandem. The Acts specifically provided that in the case of a conflict, equity would prevail. Thus, in the latter nineteenth century, the breakdown of the rigid technicalities of the common-law of torts, as well as the merging of equity and the common law principles in a single court system, created the fertile ground from which modern tort law sprang.

Let us return for a brief moment to the time of the birth of the law of equity. The economic and living conditions were so severe, particularly for the serfs and vassals, that many took to the hills and the forests, lived outside the established order, and preyed upon the countryside and their countrymen. It is apparently from this historical setting, when bands of robbers roamed the realm, that the legend of Robin Hood arose. I am saddened to have to report that while the tales of Robin Hood are many, there is little historical proof that he actually existed.<sup>9</sup> The earliest ballads, which reportedly dated from at least the fourteenth century, recounted tales of rebellious behavior with attacks upon the resources and the representatives of authority, principally the Sheriff of Nottingham. Robin Hood treated women, the poor, and the serfs far better than he did the establishment. This gave rise to the legend that he and his band took from the rich to give to the poor, from those who had to those who had not. It is perhaps not an accident that the legend of Robin Hood arose at the same time that the law of equity began to flourish. And, as we will see, mod-

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<sup>8</sup> G.W. KEETON, *AN INTRODUCTION TO EQUITY* 112 (1956).

<sup>9</sup> See 8 *ENCYCLOPEDIA BRITANNICA* 615 (1981).

ern tort law, which many critics believe has come to be nothing more, nor less, than a vehicle for reallocating economic resources, borrows extensively from both sources.

## II. THE AMERICAN EXPERIENCE THROUGH 1980: THE TRIUMPH OF EQUITY

Tort law in the United States prior to the mid-nineteenth century, like the infant nation, lacked cohesion. The time has been described as a period of "no-liability" because of various court-made immunities, limited concepts of duty, and, borrowing from our Anglo-Saxon heritage, restrictively technical notions of what constituted an actionable claim. However, as the importance of the distinction between trespass and trespass on the case declined, courts came to rely more and more upon the concept of fault as justification for shifting the cost of accidents from victims to defendants.<sup>10</sup>

In a 1989 article,<sup>11</sup> Dean Fox referred to the twin cases of *Losee v. Buchanan*<sup>12</sup> and *Losee v. Clute*<sup>13</sup> as illustrative of the thinking and limitations of nineteenth century tort law:

Buchanan, a paper company, had bought a steam boiler from Clute. The boiler exploded onto the property of Losee, destroying Losee's buildings and personal property. Losee sued Buchanan, but Buchanan, free from negligence, won. Losee then sued Clute, the manufacturer, for negligent manufacture of the boiler. But Clute had contracted only with the paper company; consequently it owed lessee "no duty whatever," and Losee lost again. If absence of fault did not rule out recovery, absence of privity usually did.<sup>14</sup>

Fault was an absolute prerequisite to any recovery in the latter half of the nineteenth century. For example, when Mr. Kendall attempted to separate two fighting dogs with a stick, he inadvertently stuck Mr. Brown in the eye. In overturning a jury verdict for Mr. Brown and ordering a new trial, Chief Judge Shaw wrote:

The rule is . . . that the plaintiff must come prepared with evi-

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<sup>10</sup> See generally G.E. WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* (1980).

<sup>11</sup> Fox, *A Century of Tort Law—Holmes, Traynor, and Modern Times*, TRIAL, July 1989, at 78.

<sup>12</sup> 51 N.Y. 476 (1873).

<sup>13</sup> 51 N.Y. 494 (1873).

<sup>14</sup> Fox, *supra* note 11, at 80.

dence to show either that the *intention* was unlawful, or that the defendant was *in fault*; for if the injury was unavoidable and the conduct of the defendant was free from blame, he will not be liable. If, in the prosecution of a lawful act, a casualty purely accidental arises, no action can be supported for an injury arising therefrom.<sup>15</sup>

This requirement of fault was consistent with an earlier New York decision in *Harvey v. Dunlop*.<sup>16</sup> In denying recovery for a five-year-old girl who was inadvertently struck by a stone thrown by a six-year-old boy, the New York Court of Correction of Errors stated:

No case or principle can be found, or if found can be maintained, subjecting an individual to liability for an act done without any fault on his part . . . All the cases concede that an injury arising from accident, or, which in law or reason is the same thing, from an act that ordinary human care and foresight are unable to guard against, is but the misfortune of the sufferer, and lays no foundation for legal responsibility.<sup>17</sup>

Thus, it is understandable that Oliver Wendell Holmes, Jr. would write in *The Common Law* in 1881: "The general principle of our law is that loss from accident must lie where it falls, and this principle is not affected by the fact that a human being is the instrument of misfortune."<sup>18</sup>

How far we have come in a little over 100 years! The notion that privity, a concept that arose in the law of contracts, must exist between a plaintiff and a defendant before there could be a recovery in tort was the first to fall. In *MacPherson v. Buick Motor Co.*,<sup>19</sup> then Judge Benjamin Cardozo, after making specific reference to Mr. Losee's plight, changed the rules by concluding that although there was no direct or contractual relationship between the plaintiff and Buick, the absence of such a relationship would not bar recovery.

If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made [and] . . . there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a

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<sup>15</sup> *Brown v. Kendall*, 60 Mass. (6 Cush.) 292, 295-96 (1850) (citation omitted).

<sup>16</sup> *Lalor Supp. to Hill & Den.* 193 (N.Y. 1843).

<sup>17</sup> *Id.* at 194.

<sup>18</sup> O.W. HOLMES, JR., *THE COMMON LAW* 94 (1881).

<sup>19</sup> 217 N.Y. 382, 111 N.E. 1050 (1916).



duty to make it carefully.<sup>20</sup>

Fully cognizant of the step he was taking, Judge Cardozo blazed the trail for the expansion of liability that we have witnessed and effectively buried any vestiges of contract law that remained lurking in our tort law:

In such circumstances, the presence of a known danger, attendant upon a known use, makes vigilance a duty. We have put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else. *We have put the source of the obligation where it ought to be. We have put its source in the law.*<sup>21</sup>

The next major change began quietly on a Sunday morning, August 24, 1924. That day, like December 7, 1941, is a day that truly will live in infamy for it was on that day that rules of equity began to dominate American tort law. That was the day that Helen Palsgraf took her two daughters, Lillian and Elizabeth, to the Long Island Railroad East New York station in Brooklyn and bought tickets for a ride to Rockaway Beach. The facts of *Palsgraf v. Long Island Railroad*<sup>22</sup> were succinctly laid out by Chief Judge Cardozo in his opinion for the majority:

Plaintiff was standing on a platform of defendant's railroad after buying a ticket to go to Rockaway Beach. A train stopped at the station, bound for another place. Two men ran forward to catch it. One of the men reached the platform without mishap, though the train was already moving. The other man, carrying a package, jumped aboard the car, but seemed unsteady as if about to fall. A guard on the car, who had held the door open, reached forward to help him in, and another guard on the platform pushed him from behind. In this act, the package was dislodged, and fell upon the rails. It was a package of small size, about fifteen inches long, and was covered by a newspaper. In fact it contained fireworks, but there was nothing in its appearance to give notice of its contents. The fireworks when they fell exploded. The shock of the explosion threw down some scales at the other end of the platform, many feet away. The scales struck the plaintiff, causing injuries for which she sues.<sup>23</sup>

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<sup>20</sup> *Id.* at 389, 111 N.E. at 1053.

<sup>21</sup> *Id.* at 390, 111 N.E. at 1053 (emphasis added).

<sup>22</sup> 248 N.Y. 339, 162 N.E. 99 (1928).

<sup>23</sup> *Id.* at 340-41, 162 N.E. at 99.

I will not bore you with extensive recitation of the mountain of comment and scholarship generated by this case. Suffice it to say that the decision was four to three with Chief Judge Cardozo writing for the bare majority and Judge Andrews for the dissenters. The issue, simply stated, was whether the Long Island Railroad was liable in negligence to Helen Palsgraf. Chief Judge Cardozo treated the case not as one of causation but of duty. He held that the Long Island Railroad was not liable to Mrs. Palsgraf because the guard was not under a legal duty to protect her from the risk of injury due to exploding fireworks. Such an injury was "unforeseeable," and therefore it was irrelevant whether a "causal relation" existed between the negligence of the guard in dislodging the package and Mrs. Palsgraf's injury.<sup>24</sup> Judge Andrews dismissed Chief Judge Cardozo's limited notion of duty: "[W]e are told that 'there is no negligence unless there is in the particular case a legal duty to take care, and this duty must be one which is owed to the plaintiff himself and not merely to others.' This I think too narrow a conception."<sup>25</sup> He continued:

The proposition is this: Every one owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others. Such an act occurs. Not only is he wronged to whom harm might reasonably be expected to result, but he also who is in fact injured, even if he be outside what would generally be thought the danger zone.<sup>26</sup>

Where Chief Judge Cardozo found the existence of a relationship a precondition for negligence, Judge Andrews saw universal duty regardless of any relationship. But even Judge Andrews believed that this universal duty was not without limit, and that limit was proximate cause. "What we do mean by the word 'proximate' is that, because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point."<sup>27</sup> In essence, Chief Judge Cardozo and Judge Andrews argued about apples and oranges with Chief Judge Cardozo's apples winning the battle because he had the votes; however, Judge Andrews' oranges won the war.<sup>28</sup>

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<sup>24</sup> *Id.* at 340-47, 162 N.E. at 99.

<sup>25</sup> *Id.* at 348-49, 162 N.E. at 102 (Andrews, J., dissenting) (citation omitted).

<sup>26</sup> *Id.* at 350, 162 N.E. at 103 (Andrews, J., dissenting).

<sup>27</sup> *Id.* at 352, 162 N.E. at 103 (Andrews, J., dissenting).

<sup>28</sup> See R. KEETON, *LEGAL CAUSE IN THE LAW OF TORTS* 120 (1963). Professor Keeton concluded as follows:

In the sixty-two years since *Palsgraf* was decided, it is the dissent of Judge Andrews, his concept of "universal duty," and his definition of "proximate cause" that have prevailed. Indeed, his, if you will, "equitable" definition of proximate cause has been elevated to doctrine: In 1941, Dean Prosser wrote in his treatise, *The Law of Torts*, that "'proximate cause,' cannot be reduced to absolute rules . . . 'it is always to be determined on the facts of each case upon mixed considerations of logic, common sense, justice, policy and precedent.'"<sup>29</sup> I submit that this definition is precisely the standard that the Lord Chancellor began to use in the courts of equity in the thirteenth century, and it is this equitable standard, as interpreted and applied by the judges of this land, that led to the vast expansion of tort liability.

As courts inexorably continued down the path of finding ways to permit injured plaintiffs to recover, they followed the map drawn by Chief Judge Cardozo in *MacPherson* by finding that a defendant owed a duty to an injured plaintiff and "put its source

Since the rendition of the *Palsgraf* decision in 1928, hundreds of judges and commentators and thousands of students and lawyers have spent millions of hours in the communication of billions of thoughts about the *Palsgraf* problem. Who knows what tort law might have been today had all this intellectual energy been directed elsewhere? Who knows the scope of the consequences of which *Palsgraf* is the *sine qua non*?

Against this background, you may find interesting a letter that recently came to my attention . . .

November 27, 1961

Dear Sir:

\* \* \*

What I want to tell you is that your . . . story about the woman being hit by the scales on the subway platform when the guards knocked a package of fireworks out of a fellow's hands gave me a real bang . . . I once saw something like that myself . . .

Me and my buddies—we were what you would call juveniles—we were playing a game something like that game of rush . . . One kid starts pushing another and pushes somebody else till pretty soon you have a whole line headed hell-bent for a crash against some poor sucker who's looking the other way. The subway was a great place to play the game . . . Well, one day we misfired and instead of hitting a sucker we hit some scales on the station platform, and they fell over and hit this dame with her two kids. Fortunately somebody set off some fireworks just then. It was real funny. This dame says to one of her two little girls, "What happened, Lillian?" and some deep voice timed just right to sound like it was Lillian answering says "It's a hell of a way to run a railroad."

*Id.* at 120-22.

<sup>29</sup> W. PROSSER, A TREATISE ON THE LAW OF TORTS (1941), quoted in G. E. WHITE, *supra* note 10, at 101.

in the law,"<sup>30</sup> often after the fact. To demonstrate the point, let us look at new duties that have been found and some of the causes of action that have been created since *MacPherson* and *Palsgraf*.

*Constitutional Tort*: It was also in Brooklyn, on July 7, 1967, in the United States District Court for the Eastern District of New York, that a *pro se* suit was filed by one Webster Bivens. Mr. Bivens sought \$15,000 from six unknown federal agents because he believed that his constitutional rights had been violated when he was arrested and searched on November 26, 1965. The district judge dismissed the complaint on the ground that it failed to state a cause of action. In denying Bivens' motion for leave to appeal in forma pauperis, the district judge wrote:

It is abundantly clear that no federal question is presented by the complaint.

The court adheres to its prior ruling dismissing the complaint on the merits. Under the circumstances, an appeal would be frivolous. The court certifies that the appeal is not taken in good faith.<sup>31</sup>

Notwithstanding that it was "abundantly clear" that an appeal would be "frivolous" and "not taken in good faith,"<sup>32</sup> the Supreme Court ultimately held that Bivens, by now represented by court-appointed counsel, had stated a cause of action. "Having concluded that petitioner's complaint states a cause of action under the Fourth Amendment, we hold that petitioner is entitled to recover money damages for any injuries he has suffered as a result of the agents' violation of the Amendment."<sup>33</sup> On remand, after a determination by the Second Circuit that the doctrine of official immunity would not be a bar to recovery, the case returned to Brooklyn, where it was settled for \$500.00. In his concurring opinion, Justice Harlan stated:

[I]t is apparent that some form of damages is the only possible remedy for someone in Bivens' alleged position. It will be a rare case indeed in which an individual in Bivens' position will be able to obviate the harm by securing injunctive relief from any court. However desirable a direct remedy against the Government

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<sup>30</sup> *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 390, 111 N.E. 1050, 1053 (1916).

<sup>31</sup> *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 276 F. Supp. 12, 16 (E.D.N.Y. 1967), *aff'd*, 409 F.2d 718 (2d Cir. 1969), *rev'd*, 403 U.S. 388 (1970).

<sup>32</sup> *Id.*

<sup>33</sup> *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1970).

might be as a substitute for individual official liability, the sovereign still remains immune to suit. Finally, assuming Bivens' innocence of the crime charged, the "exclusionary rule" is simply irrelevant. *For people in Bivens' shoes, it is damages or nothing.*<sup>34</sup>

It is clear from the candor of Justice Harlan that the driving force behind the creation of the new "constitutional tort" was the equitable maxim: "Equity will not suffer a wrong to be without a remedy."

*Products Liability (DES)*: It is in the same spirit, perhaps with even more candor, that the court ruled in the DES case of *McCormack v. Abbott Laboratories*.<sup>35</sup> When it became apparent that the plaintiff could not establish that the product administered to her mother was made by a specific manufacturer, Judge Garrity lifted the traditional burden of proof from her shoulders and imposed a "market share" theory of liability.

Finally, the magnitude of the physical and psychological injuries which are at issue in DES cases counsels toward permitting a remedy under some form of market-share theory of liability. As between the injured plaintiff and the possibly responsible drug company, the latter is in a better position to absorb the cost of injury. The company can insure itself against liability, absorb the damage award, or distribute it among the public as a cost of doing business, thereby spreading the cost over all consumers. *In many cases the only alternative will be to place the burden solely on the injured plaintiff.*<sup>36</sup>

Just as it was the alleged violation of Webster Bivens' fourth amendment rights that prompted the creation of the "constitutional tort," it was the "magnitude of the physical and psychological injuries"<sup>37</sup> sustained by Shelley McCormack that gave rise to a new equitable theory of liability in Massachusetts.

*Third Party Liability*: A therapist and an employer have a duty to warn potential victims of a dangerous patient. This duty was held to arise from the foreseeability of harm.<sup>38</sup>

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<sup>34</sup> *Id.* at 409-10 (Harlan, J., concurring).

<sup>35</sup> 617 F. Supp. 1521 (D. Mass. 1985).

<sup>36</sup> *Id.* at 1526 (emphasis added).

<sup>37</sup> *Id.*

<sup>38</sup> *Tarasoff v. Regents of the Univ. of Cal.*, 17 Cal. 3d 425, 434-43, 551 P.2d 334, 342-49, 131 Cal. Rptr. 14, 22-29 (1976). *But see* *Brenneman v. State*, 208 Cal. App. 3d 812, 818-20, 256 Cal. Rptr. 363, 367-68 (1989) (public entities and employees have no affirmative duty to warn of release of violent inmate who has made only nonspecific threats against nonspecific victims).

*Social Host Liability:* Legislatures through dram shop acts and courts through common law decisions have subjected tavern owners to liability for damages caused by those to whom they serve alcohol. Some states have extended this liability to social hosts who serve drinks in private homes.<sup>39</sup>

*Accountants:* An actionable duty of care is now owed to anyone who might reasonably rely upon financial statements.<sup>40</sup>

*Municipalities:* There has been a steady progression from sovereign immunity to sovereign responsibility.<sup>41</sup>

*Strict Liability:* Although it evolved from negligence, implied warranty, and *res ipsa loquitur*,<sup>42</sup> strict liability began to stand on its own in the 1960's.<sup>43</sup>

*Products Liability:* With privity dismissed as a bar to recovery and strict liability the rule, plaintiffs were increasingly able to reach the juries upon theories of product defect, failure to warn, and design defect. Successor corporations were held liable for the acts of their predecessors, and, when plaintiffs could not meet the burden of identifying the exact manufacturer of the product causing the injury, whole industries were held to answer in damages proportionate to their share of the market. *Helene Curtis Industries V. Pruitt*<sup>44</sup> is a striking example of the influence of equity in products liability cases.

Until Americans have a comprehensive scheme of social insurance, courts must resolve by a balancing process the head-on collision between the need for adequate recovery and viable enterprises. This balancing task should be approached with a realization that the basic consideration involves a determination of the most just allocation of the risk of loss between the members of the marketing chain.<sup>45</sup>

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<sup>39</sup> See, e.g., *Kelly v. Gwinnell*, 96 N.J. 538, 548-51, 476 A.2d 1219, 1224-25 (1984); *Koback v. Crook*, 123 Wis. 2d 259, 267-77, 366 N.W.2d 857, 861-65 (1985).

<sup>40</sup> See *International Mortgage Co. v. John B. Butler Accountancy Corp.*, 177 Cal. App. 3d 806, 817-21, 223 Cal. Rptr. 218, 225-27 (1986).

<sup>41</sup> See *DeLong v. County of Erie*, 89 A.D.2d 376, 384-89, 455 N.Y.S.2d 887, 892-93 (4th Dep't 1982), *aff'd*, 60 N.Y.2d 296, 457 N.E.2d 717, 469 N.Y.S.2d 611 (1983) (county held liable because assistance from 911 not quick enough to save life).

<sup>42</sup> See *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 459-61, 150 P.2d 436, 439-40 (1944).

<sup>43</sup> See *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 62-64, 377 P.2d 897, 900-01, 27 Cal. Rptr. 697, 700-01 (1962).

<sup>44</sup> 385 F.2d 841 (5th Cir. 1967), *cert. denied*, 391 U.S. 913 (1968).

<sup>45</sup> *Id.* at 862 (citation omitted).

*Wrongful Birth:* Courts have permitted wrongful birth actions by parents against physicians based upon the failure of a sterilization procedure,<sup>46</sup> a failed abortion,<sup>47</sup> the failure to inform of an actual or possible birth defect,<sup>48</sup> and negligent preconception genetic counseling<sup>49</sup> thus denying the parents the option of abortion. In *Smith v. Cote*,<sup>50</sup> the court noted that "[o]f the jurisdictions that have considered the issue [of wrongful birth], only North Carolina refuses to allow recovery."<sup>51</sup> Moreover, the *Smith* court recognized the profound impact of the Supreme Court decision in *Roe v. Wade*<sup>52</sup> on subsequent wrongful birth cases: "[W]e believe that *Roe* is controlling; we do not hold that our decision would be the same in its absence."<sup>53</sup> The impact of *Webster v. Reproductive Health Services*<sup>54</sup> remains to be seen.

*Wrongful Life:* The California judiciary, in *Curlender v. Bio-Science Laboratories*,<sup>55</sup> was the first to recognize a wrongful life cause of action brought by a child against a physician or health care provider for the burden of having to live in an impaired state.<sup>56</sup> *Turpin v. Sortini*<sup>57</sup> curtailed the *Curlender* decision somewhat by refusing to grant general damages, including damages for pain and suffering, to the impaired infant. Wrongful life suits have also been permitted by the highest courts of Washington<sup>58</sup> and New Jersey.<sup>59</sup> An intermediate Indiana appellate court recently permitted a wrongful life suit on behalf of a potentially impaired child conceived by institutionalized parents who allegedly were not

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<sup>46</sup> See, e.g., *Wilbur v. Kerr*, 275 Ark. 239, 244, 628 S.W.2d 568, 571 (1982) (failed sterilization gave rise to damage recovery); *Sorkin v. Lee*, 78 A.D.2d 180, 184, 434 N.Y.S.2d 300, 303 (4th Dep't 1980) (damages recovered).

<sup>47</sup> See *Stills v. Gratton*, 55 Cal. App. 3d 698, 704, 127 Cal. Rptr. 652, 656 (1976).

<sup>48</sup> See *Smith v. Cote*, 128 N.H. 231, 239-41, 513 A.2d 341, 346-48 (1986).

<sup>49</sup> See *Viccaro v. Milunsky*, Nat'l L.J., Apr. 2, 1990, at 33, col. 2 (Mass. Mar. 1, 1990).

<sup>50</sup> 128 N.H. 231, 513 A.2d 341 (1986).

<sup>51</sup> *Id.* at 238, 513 A.2d at 345 (1986) (citing *Azzolino v. Dingfelder*, 315 N.C. 103, 116-17, 337 S.E.2d 528, 537 (1985)).

<sup>52</sup> 410 U.S. 113 (1973).

<sup>53</sup> *Smith*, 128 N.H. at 239, 513 A.2d at 346.

<sup>54</sup> 492 U.S. 490 (1989).

<sup>55</sup> 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (1980).

<sup>56</sup> See *id.* at 828-29, 165 Cal. Rptr. at 488 ("injury, of course, is not the particular defect with which a plaintiff is afflicted—considered in the abstract—but it is the birth of the plaintiff with such a defect").

<sup>57</sup> 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982).

<sup>58</sup> See *Harbeson v. Parke-Davis, Inc.*, 98 Wash. 2d 460, 478-83, 656 P.2d 483, 494-97 (1983).

<sup>59</sup> See *Procanik v. Cillo*, 97 N.J. 339, 350-51, 478 A.2d 755, 761-62 (1984).

adequately supervised by the defendant nursing home.<sup>60</sup>

My favorite example of an equitable, result-oriented decision is *Lombardo v. Hoag*.<sup>61</sup> In holding that a nonowner of a vehicle could be liable to an injured passenger when he negligently returned the vehicle to its allegedly "buzzed" owner, the judge wrote:

Society demands . . . that a person exercise a duty of care towards another person in order to insure that the other person remains free from harm, if he can do so without peril to himself. And it demands an atmosphere in which all persons will expect that others will conduct themselves in such a manner. Defendant Niemeyer had an obligation in the law to do what he could to see that Hoag did not drive his vehicle while intoxicated. *And, it is of no particular moment whether we express that obligation in terms of duty, or in terms of proximate cause or foreseeable risk, or whether we premise it on some legal rule such as negligent entrustment, or assistance and encouragement, or negligently permitting improper persons to use certain chattels, or entrustment of a chattel by a person known to be incompetent, or anything else for that matter.*<sup>62</sup>

Such a statement is pure heresy in the church of traditional tort theory, where duty, breach of duty, causation, and damages are distinct elements, each requiring a separate precise analysis and determination. However, it accurately reflects the state of tort law in 1990. Robin Hood—and Judge Andrews—would have understood.

### III. A WORD ABOUT INSURANCE

In searching for some insight into our Anglo-Saxon heritage and tort law, I came across the following quote from a Professor Heldrich from the University of Munich:

The interplay of tort law and modern insurance practices has resulted in a socialization of the risks and losses that are inevitable in modern society. The ancient starting point of tort law—"the loss lies where it falls"—has largely been replaced by its modern counterpart—"the loss lies with the community."<sup>63</sup>

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<sup>60</sup> See *Cowe v. Forum Group, Inc.*, 541 N.E.2d 962, 965-66 (Ind. Ct. App. 1989), *aff'd in part, vacated in part*, 575 N.E.2d 630 (Ind. 1991).

<sup>61</sup> 237 N.J. Super. 87, 566 A.2d 1185 (N.J. Super. Ct. Law Div. 1989).

<sup>62</sup> *Id.* at 95, 566 A.2d at 1189-90 (emphasis added; footnotes omitted).

<sup>63</sup> 18 ENCYCLOPEDIA BRITANNICA 525 (Macropaedia 15th ed.).



The shift of the burden of a loss from where it falls to the community as a whole was a massive one which mirrored the equally massive changes in our economic structure and institutions. As we grew from neighborhood to global economic relationships, tort law kept pace and, beginning with the workers' compensation plans, the insurance industry became a major player.

In the late nineteenth century, as commerce and industry developed on an increasing scale, injuries and deaths resulting from industrial accidents multiplied. The courts were ill-equipped to deal with the number of claims, assuming, of course, that they could be shoehorned to fit within the strict pleading requirements and fault could be proved. Germany enacted the first workers' compensation plan in 1886, and Great Britain soon followed suit. In the United States, the first compulsory coverage plan was adopted by New York.<sup>64</sup> The central feature of the workers' compensation plans was a trade-off: an injured worker gave up the common law right to bring a damage action against the employer in return for an automatic recovery without having to prove fault. Workers' compensation was the first, but certainly not the last, legislative venture into "no-fault" recovery.

Insurance premiums became a necessary cost of doing business for virtually every enterprise, and, as the need for insurance grew, so did the power of the insurance industry. The Swine Flu Emergency provides perhaps the best example of this raw power and its most effective use. In 1976, there was widespread belief that the prospect of a swine flu epidemic presented the United States with a major public health problem. The issue was escalated to Presidential level, and emergency legislation was requested from Congress. Round-the-clock committee meetings produced a legislative plan providing for the manufacture, distribution, and administration of a vaccine to virtually the entire nation. When the drug manufacturers sought to determine the cost of insurance in order to be able to set a price for the vaccine, they were advised by their insurers that policies then in existence would not apply and that new coverage would not be written because of the advance of strict liability and the uncertainties inherent in any prediction as to the

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<sup>64</sup> In 1911, the plan was struck down as violative of the due process clauses of both the federal and state constitutions. See *Ives v. South Buffalo Ry.*, 201 N.Y. 271, 292-300, 94 N.E. 431, 439-42 (1911). New York amended its state constitution to authorize the adoption of a compensation system, and the Supreme Court ultimately ruled that the scheme did not violate the federal constitution. *New York Cent. R.R. v. White*, 243 U.S. 188, 206-07 (1917).

nature and extent of potential injuries. The drug companies were willing to provide the vaccine at cost, but they were not willing to run the risk of facing the prospect of tort suits without liability insurance.

At the eleventh hour, over a weekend, a bill was drafted to provide that the manufacturers could not be named as defendants in any suits resulting from the program if they kept within the statutory and regulatory requirements. The United States was offered up as the only viable defendant. The Senate passed the legislation; so did the House, without even waiting for copies of the Senate bill. It was signed by President Ford on August 12, 1976.<sup>65</sup> In essence, by refusing to provide coverage, the insurance industry was able to shift the burden of liability from itself and the manufacturers to the taxpayer at an ultimate cost, as of October 1990, of \$92,833,020.

Since the late nineteenth century, the insurance industry has been a major player in the economic growth of industrial societies and in the development of tort law. Judges wrote opinions, and, instructions to the contrary notwithstanding, juries reached decisions predicated upon the common knowledge that institutional and individual defendants were insured. And it was this conviction, in major part, that fed the expansion of liability.

#### IV. THE "LIABILITY CRISIS" OF THE 1980's

While some commentators continue to question whether, in fact, there ever was a "Liability Crisis," there can be no doubt that the public perceived that something was wrong with the system. The media—daily newspapers, weekly general and trade magazines, and nightly newscasts—fed a "crisis" mentality that was reinforced by rising consumer prices, the disappearance of products and services from the market, and reports of huge increases in the number and amounts of plaintiffs' verdicts in tort cases.

Jury Verdict Research, Inc., reported that in 1975 there were three verdicts in medical malpractice cases and nine in products liability cases that exceeded one million dollars. In 1984, the corresponding figures were seventy one and eighty six.<sup>66</sup> In addition,

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<sup>65</sup> See National Swine Flu Immunization Program of 1976, Pub. L. No. 94-380, 90 Stat. 1113.

<sup>66</sup> REPORT OF THE TORT POLICY WORKING GROUP ON THE CAUSES, EXTENT AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY (1986)

there was

dramatic growth in both the frequency and size of punitive damages awards in product liability litigation. Before 1970 there was only one reported appellate decision upholding an award of punitive damages in a product liability case, and that was an award of \$250,000. As of 1976, only three punitive damages verdicts, none in excess of \$250,000, had been upheld in reported appellate product liability decisions. Today, hardly a month goes by without a multimillion-dollar punitive damages verdict in a product liability case.<sup>67</sup>

At the same time, the insurance industry was hit with astronomical losses of \$21 billion in 1984 and \$25 billion in 1985<sup>68</sup> and it simply revolted. The industry argued that the more liability was imposed by judges and juries after the fact based upon equitable principles of fairness and justice, the less predictability and guidance was available for accurate risk assessment and sound business decisions.<sup>69</sup> The insurance industry effectively picked up its ball, announced it would not play any longer, and left the field.

Citing its inability to set premiums because of shifting rules, geometric increases both in numbers of tort judgments and in dollars, broad scale exposure in the environmental, asbestos, mass tort, and products liability arenas, and inadequate or nonexistent reserves, the insurance companies, while raising premiums, either refused to write policies or drastically cut back on the amount of coverage. Critics argued that industry losses actually were due to poor strategic planning, decreasing rates of return on increasingly speculative investments, lax industry practice with respect to reserve requirements, or bookkeeping legerdemain, but the net effect was the same: liability insurance became extremely expensive if it was available at all.

As a result of the high costs of liability, some manufacturers

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[hereinafter REPORT OF THE TORT POLICY WORKING GROUP].

<sup>67</sup> Wheeler, *A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Product Liability Litigation*, 40 ALA. L. REV. 919, 919 (1989) (footnotes omitted).

<sup>68</sup> REPORT OF THE TORT POLICY WORKING GROUP, *supra* note 66, at 1.

<sup>69</sup> In the course of seminars for senior federal managers, I tried to make this point by analogizing an insurance company to a "bookie" and pointing out that no bookie would accept a bet unless the odds were known. In the insurance business, this process is more refined: it is called setting the premium. Unless there is a statistical and actuarial basis for assessing risk and setting a premium, insurance companies will not underwrite coverage.

ceased production of vaccines and drugs.<sup>70</sup> Professional malpractice premiums for doctors, engineers, accountants, and lawyers skyrocketed, causing many to quit or curtail their practices; many others decided to "go bare."<sup>71</sup> Municipalities lost coverage and put a clamp on many activities, such as sledding in the parks and swimming in the pools.<sup>72</sup>

Were it not for the Reagan Administration, we might never have known that we were in the midst of a "Liability Crisis." I joined the Torts Section of the Civil Division in September 1973, and for the next decade or so we labored in relative obscurity. The office was located about four blocks from the main Department of Justice building, and we were treated with benign neglect by our political leadership. Torts was not a sexy business, and, as long as we did not lose too much money and stayed out of the newspapers, we were left alone. All of that changed in 1985 when the Reagan Administration made tort reform a major policy issue and created the Tort Policy Working Group of the Domestic Policy Council, which consisted of a senior administration official and general counsels of eleven federal agencies.

The Group issued two reports that highlighted the practices and problems of the insurance industry, publicized the adverse impact of the doctrinal and substantive changes in tort law, documented the adverse economic and quality of life consequences suffered by virtually all segments of society, and issued a clarion call for insurance and tort reform, principally at state level.<sup>73</sup> Although many commentators challenged the underlying data, the methodology, and the conclusions of the reports, the criticisms served to re-

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<sup>70</sup> Perhaps the most dramatic example is the Bendectin litigation, in which Merrell-Dow decided to cease distribution of the drug in response to the thousands of tort suits alleging that Bendectin caused birth defects. See *Lynch v. Merrell-Nat'l Labs.*, 830 F.2d 1190, 1191 (1st Cir. 1987). Bendectin was an antinausea drug approved for use in pregnancy by the Food and Drug Administration ("FDA") in 1956. *Id.* Ironically, scientific causation between use of Bendectin and birth defects could not be proved, and the FDA never withdrew its approval. See *DeLuca v. Merrell Dow Pharmaceuticals, Inc.*, 911 F.2d 941, 943 (3d Cir. 1990); see also Copulos, *An Rx for the Product Liability Epidemic*, Heritage Found. Backgrounder, No. 434, (May 15, 1985) (LEXIS, NEXIS library, Omni file).

<sup>71</sup> See, e.g., Moss, *Going Bare: Practicing Without Malpractice Insurance*, 73 A.B.A. J. 82, 82 (Dec. 1987) (considering dilemma of sole practitioner whose insurance rates rose so high that "he decided to go bare").

<sup>72</sup> See Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521, 1521-22 (1987) (insurance crisis affected jails, police patrols, parks and forest preserves, and Fourth of July celebrations).

<sup>73</sup> See AN UPDATE ON THE LIABILITY CRISIS (1987); REPORT OF THE TORT POLICY WORKING GROUP, *supra* note 66.

inforce the popular conception that the system was indeed broke and someone had to fix it.

One other player deserves mention: the Supreme Court. In a number of decisions, the Court increased the vulnerability of certain segments of society. In *Westfall v. Erwin*,<sup>74</sup> a unanimous Court effectively eliminated the immunity that had protected federal employees from liability for common law torts.<sup>75</sup> And, in two cases, the Court ruled that judges were not above the fray. In *Pulliam v. Allen*,<sup>76</sup> a state magistrate was not excused from having to pay over \$7,000 in fees to a successful plaintiff's attorney under 42 U.S.C. § 1988,<sup>77</sup> and, in *Forrester v. White*,<sup>78</sup> the Court ruled that judicial immunity did not protect a judge from a damages suit arising out of administrative or executive functions such as the allegedly discriminatory firing of a probation officer.<sup>79</sup>

## V. THE LEGISLATURES STRIKE BACK

Propelled by the so-called "Liability Crisis" and cries for reform, the action shifted from the commercial and judicial arenas to the legislatures.

The legislative tort reform movement has been successful beyond the hopes of its most ardent advocates. Academia was caught napping. The legislative coup was so quick and ferocious that commentators did not have time to react. Some early scholarly discussion focused on proposed federal product liability legislation. However, oblivious to the debate in the nation's capital, state legislatures created their own individualized "reform packages." Each piece of legislation, itself, is not earth shattering, but, in toto, the changes have substantially altered the law of torts.<sup>80</sup>

Remedial legislation took two forms. One was directed at the insurance industry, and in every instance the result was increased state regulation. According to a report issued by the Tort Policy Working Group, "37 States placed restrictions on the manner in which liability insurance policies can be canceled or not re-

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<sup>74</sup> 484 U.S. 292 (1988).

<sup>75</sup> *Id.* at 295-98.

<sup>76</sup> 466 U.S. 522 (1984).

<sup>77</sup> *Id.* at 553.

<sup>78</sup> 484 U.S. 219 (1988).

<sup>79</sup> *Id.* at 229-30.

<sup>80</sup> Twerski, *The Joint Tortfeasor Revolt: A Rational Response To The Critics*, 22 U.C. DAVIS L. REV. 1125, 1125-26 (1989).

newed.”<sup>81</sup> Twenty-two states authorized self-insurance programs or the development of risk-pools.<sup>82</sup> In addition, greater scrutiny of rate increases was provided and “at least 21 states imposed some degree of new information reporting requirements upon the insurance industry.”<sup>83</sup>

The other legislative reform was directed to substantive tort law. Professor Twerski notes that “[f]rom January 1986 to August 1988 some 35 states enacted significant tort reform legislation. This figure does not include states that passed legislation dealing with insurance reform. It also does not include states whose tort reform legislation antedated January 1986.”<sup>84</sup> The American Tort Reform Association (“ATRA”) reports that as of December 31, 1989, forty-one states had enacted some type of substantive tort legislation.<sup>85</sup>

No consensus can be drawn from the enactments of the various state legislatures and indeed, consideration continues on some issues today. Among the areas debated were joint and several liability, noneconomic damages such as pain and suffering, punitive damages, periodic payments, the collateral source rule and, last but not least, contingency fees. Some states have placed thresholds upon the application of the joint and several liability doctrine.<sup>86</sup> Sliding scales have been imposed upon contingency fees. Damages for pain and suffering have been curtailed. Punitive damages have been capped.<sup>87</sup>

Reform was not confined to the state legislatures. On October 20, 1988, just nine months after the Supreme Court decision in *Westfall v. Erwin*,<sup>88</sup> the 100th Congress unanimously overruled *Westfall* and enacted the Federal Employees Liability Reform and Tort Compensation Act of 1988.<sup>89</sup> President Reagan signed it into law on November 18, 1988. The Act provides that the sole remedy

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<sup>81</sup> UPDATE, *supra* note 73, at 74.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> Twerski, *supra* note 80, at 1125 n.1.

<sup>85</sup> See AM. TORT REFORM ASS'N, TORT REFORM REP. (Dec. 31, 1989).

<sup>86</sup> See Note, 1986 Tort Reform Legislation: A Systematic Evaluation of Caps on Damages and Limitations on Joint and Several Liability, 73 CORNELL L. REV. 628, 636 (1988) (“many comparative negligence states that had retained joint and several liability either limited or eliminated joint and several liability”).

<sup>87</sup> See Wheeler, *supra* note 67, at 927.

<sup>88</sup> 484 U.S. 292 (1988).

<sup>89</sup> 28 U.S.C. § 2679 (1988).

for a common law tort committed by a federal employee within the scope of federal employment is a suit against the United States under the Federal Tort Claims Act ("FTCA"). Federal employees cannot be sued personally for common law torts; this is true even if there is some jurisdictional or legal bar that prevents a suit against the sovereign.<sup>90</sup> (It must be noted that Congress has yet to act on proposed legislation that would afford increased protection for judges!)

These reforms have not gone unchallenged. Efforts to repeal state tort reforms have been strong and, in some cases, partially successful. For example, ATRA reported that as of January 1, 1990, the score was tied in the battle to rescind limitations on punitive damages. Caps have been upheld in seven states and overturned in seven others. In July 1990, the *ABA Journal* noted that caps on damages have been struck down by courts in thirteen states.<sup>91</sup>

Whatever the merits of individual insurance and tort reform proposals might be, it is clear that society said "Enough!" to the untrammelled expansion of liability. While we were perhaps willing to have the burden of loss shifted to the community at large, there were limits; the defendants as well as the plaintiffs were entitled to equitable treatment.

## VI. TORT LAW FOR THE 1990's

In this century we witnessed a slow but steady expansion of liability fostered by a growing sense of equity and result-oriented decisions reflecting a desire to compensate the injured. The 1980's were marked by violent reactions to this growth as evidenced by the revolt of the insurance industry, and then the legislative counterrevolution. What will the 1990's bring?

The tone may well be set by the Supreme Court in the case of *Cipollone v. Liggett Group, Inc.*<sup>92</sup> which presents the issue of whether the federal law requiring warning labels on cigarettes preempts tort suits under state laws for injuries and death due to smoking. Oral argument was held before an eight-member Court

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<sup>90</sup> See *United States v. Smith*, 111 S. Ct. 1180, 1184 (1991). The Court held that "the Liability Reform Act immunizes Government employees from suit even when an FTCA exception precludes recovery against the Government." *Id.* at 1189-90.

<sup>91</sup> Anderson, *Judge Rules on Tort Reform*, 76 A.B.A. J. 31, 31 (July 1990).

<sup>92</sup> 893 F.2d 541 (3rd Cir.), *cert. granted*, 111 S. Ct. 1386 (1991).

on October 8, 1991, the second day of the term. The significance of the issue and the potential for divergent views were underscored by an October 21, 1991, order setting the case for reargument in January 1992 when the court can be expected to have nine members.

It was the courts that set the stage for the tumult of the 1980's by expanding the bases for liability, by allowing or fostering the blurring of classic tort concepts and, with increasing enthusiasm and candor, by sitting as courts of equity rather than as courts of law. Robin Hood jurisprudence will continue for the simple reason that these same courts are not likely to admit that they were in error and rescind newly created duties and causes of action. That is not to say that the amount of resources reallocated from those who have (or are insured) to those who have not will be the same. Legislative limitations upon attorney fees, joint and several liability, noneconomic damages, and punitive damages may well result in diminished recoveries even for successful plaintiffs. Moreover, the public consciousness of the "Liability Crisis," whether it was imagined or real, could have a sobering effect upon jury deliberations and awards.

The courts necessarily will play a key role in determining the ultimate impact of the "Liability Crisis" and the legislative reform counterrevolution. As the savings and loan crisis and the financial difficulties facing the insurance industry have moved toward center stage, the enthusiasm for future legislative "tort reform" appears to have waned. Nevertheless, the courts still will be called upon to examine, uphold, or reject the reform enactments of recent years.

Recent data appear to indicate that continued expansion has all but ceased. In preparing for this presentation, materials were requested from the rivals in the tort reform wars, ATRA and the Association of Trial Lawyers of America ("ATLA"). Surprisingly, each of these combatants included with their responses a draft of an article entitled *The Quiet Revolution in Products Liability*, which was published in the February 1990 *UCLA Law Review*. After conducting an exhaustive empirical review of the 2,526 product liability decisions published between 1983 and 1988, the authors, Cornell Professors James A. Henderson, Jr., and Theodore Eisenberg, concluded as follows:

American courts deciding products liability cases are in the midst of a significant revolution. After decades of extending the boundaries of liability, both appellate and trial judges are reaching deci-



sions favoring products defendants in unprecedented numbers. Although it is difficult to pinpoint exactly when this legal change began, we trace its origins to the early to mid-1980s. Clearly, it has been in full swing for the past several years. Unlike most revolutions, legal and nonlegal, this one has been amazingly quiet. Other writers have observed that some recent claims of "crisis" in products and other areas of tort are exaggerated. And pro-defendant state legislative change has not gone unnoticed. But no one has paid systematic attention to patterns of all products decisions by courts. This Article discerns, and empirically establishes, that major changes in judicial decision making are occurring.<sup>93</sup>

The constitutional attack on punitive damages appears to be over, at least on the federal level. The eighth amendment gauntlet thrown down by Justice O'Connor in *Bankers Life and Casualty Co. v. Crenshaw*<sup>94</sup> and *Browning-Ferris Industries v. Kelco Disposal, Inc.*,<sup>95</sup> has not been taken up. On March 4, 1991, the Supreme Court rejected a direct fourteenth amendment due process challenge to punitive damages by a vote of seven to one with Justice O'Connor dissenting.<sup>96</sup>

In the past, when production line and factory injuries threatened to overwhelm the judicial system and when automobile accident cases grew by leaps and bounds, alternative compensation schemes were devised that took most, if not all, of the disputes out of the tort system. The 1990's may see similar reactions. Already in place is a federal mechanism created by Congress to handle injuries allegedly resulting from vaccines. No doubt prompted by the swine flu experience, Congress in 1986 created the National Vaccine Injury Compensation Program, a no-fault informal process of claims adjudication in which the only issues are medical causation and the amount of damages.<sup>97</sup>

For a decade, Senator Robert W. Kasten, Jr. (R. Wisc.) has proposed legislation which, in various forms, would preempt state

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<sup>93</sup> Henderson & Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 UCLA L. REV. 479, 539 (1990) (footnotes omitted).

<sup>94</sup> 486 U.S. 71, 88 (1988) (O'Connor, J., concurring in part and in judgment).

<sup>95</sup> 492 U.S. 257, 277 (1989); see also Jeffries, *supra* note 4, at 139; Powell, *Challenging the Constitutionality of Noneconomic Damage Caps: Boyd v. Bulala and the Right to a Trial by Jury*, 24 WILLAMETTE L. REV. 821, 829 (1988).

<sup>96</sup> *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S. Ct. 1032, 1044 (1991).

<sup>97</sup> 42 U.S.C. §§ 300aa-10 to -19 (1988). The statute originally required that all claims be submitted before October 1, 1990. During the last week of September 1990, before the deadline was extended by Congress to January 31, 1991, more than 3400 claims were filed.

law and create national product liability standards and causes of action. The Kasten bill drew only tepid, and occasionally nonexistent, support from the Reagan Administration, in part, because the concept of preemption ran counter to the loudly espoused principles of federalism. However, the Bush Administration actually favored strengthening the Kasten Bill in the 101st Congress, S. 1400. Vice President Quayle, speaking as Chairman of the President's Council on Competitiveness, declared that the "present state-by-state system of liability laws 'generates excessive litigation, inflates insurance costs and creates uncertainties for American businesses. This is a self-imposed burden on our ability to compete.'"<sup>98</sup> The Kasten bill would create a uniform product liability code, limit joint and several liability to the percentage of fault, and prohibit the award of punitive damages when the manufacturer of a drug or aircraft respectively received approval for the product from the Federal Drug Administration or the Federal Aviation Administration. The 101st Congress ended with the bill scheduled for a Senate vote and no action scheduled in the House.

#### CONCLUSION

It is too early to determine whether there has indeed been a quiet revolution in product liability law or, if so, whether the revolution is broad enough to embrace most or all of the law of torts. As we wait for answers, we would do well to reflect upon the observation of Professors Henderson and Eisenberg: "For anyone who follows products liability [indeed, all of torts], these developments bring to mind the ancient Chinese curse: 'May you live in interesting times.'"<sup>99</sup>

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<sup>98</sup> Nat'l L.J., Dec. 18, 1989, at 9, col. 1.

<sup>99</sup> Henderson & Eisenberg, *supra* note 93, at 480.

